## APPENDIX

Sections 56-801, 56-803(1) and Section 56-804 Arizona Code Annotated, 1939, reads as follows:

"56-801. Liability defined. To protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in section 7 of article 18 of the state constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the vice of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

"56-803. Hazardous occupations enumerated. The occupations hereby declared and determined to be hazardous within the meaning of this article are as follows:

1. The operation of steam railroads, electrical railroads, street railroads, by locomotives, engines, trains, motors or cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over and by which such railway business is operated."

"56-804. Right of action—Limitation. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or

death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and, if none, then to his personal representative, for the benefit of the estate of the deceased. The action for such damages shall not be maintained unless commenced within two (2) years from the day the cause of action accrued."

Sections 51 and 59 of Title 45 U.S.C.A. read as follows:

"51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories* and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin *dependent* upon such employee, for such injury or death resulting in whole or in part *from the negligence* of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence,

*or between the District of Columbia or any of the States or Territories

in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

"59. Survival of right of action of person injured. Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin *dependent* upon such employee, but in such cases there shall be only one recovery for the same injury. Apr. 22, 1908, c. 149 Sec. 9, as added Apr. 5, 1910, c. 143, Sec. 2, 36 Stat. 291."

The Fifth Amendment to the Constitution of the United States reads as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, *or property, without due process of law;* nor shall private property be taken for public use, without just compensation."

*Due service and receipt of a copy of the within is hereby admitted this.....day of April, 1953.*

KNAPP, BOYLE, BILBY & THOMPSON

By .....

Valley National Building
Tucson, Arizona

FILED
MAY 18 1953
HAROLD B. WILLEY

# In the Supreme Court of the United States

OCTOBER TERM, 1953

**No. 735**

C. C. ROMINE, as Administrator of the Estate of GEORGE A. ROMINE, Deceased,
*Petitioner,*

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
*Respondent.*

## Respondent's Brief Opposing Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

HAROLD C. WARNOCK
B. G. THOMPSON
WILLIAM A. SCANLAND
of KNAPP, BOYLE, BILBY & THOMPSON
907-916 Valley National Building
Tucson, Arizona
*Counsel for Respondent*

LAWRENCE L. HOWE
65 Market Street
San Francisco, California
*Of Counsel*

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

## TABLE OF AUTHORITIES CITED


| Cases | Pages |
|---|---|
| Allbright v. Penn. R. Co., 37 A.(2d) 870 (Md.), certiorari denied, 323 U.S. 735, 89 L.ed. 589, 69 S.Ct. 72 | 5 |
| Copley v. Industrial Accident Commission, 120 Pac.(2d) 879 (Cal.), certiorari denied, 316 U.S. 678, 62 S.Ct. 1108, 86 L.ed. 1752 | 5 |
| Desper v. Starved Rock Ferry Co., 342 U.S. 187, 72 S.Ct. 216, 96 L.ed. 205 | 6 |
| Erie R. Co. v. Winfield, 244 U.S. 170, 61 L.ed. 1057, 37 S.Ct. 556, Ann. Cas. 1918B 662, 14 NCCA 957 (1917) | 1 |
| Illinois C.R. Co. v. Doherty's Adm. (Ky.), 155 S.W. 119 | 3 |
| Jones v. Charleston Ry. (S.C.), 82 S.E. 415 | 3 |
| Lindgren v. U. S., 281 U.S. 38, 74 L.ed. 686, 50 S.Ct. 207 | 3 |
| Martin v. Pittsburgh, L. E. R. Co., 203 U.S. 284, 51 L.ed. 185, 27 S.Ct. 100 | 3 |
| Melzner v. No. Pac. Ry. Co. (Mont.), 127 Pac. 1002 | 3 |
| Mountain Timber Co. v. Washington, 243 U.S. 219, 61 L.ed. 685, 37 S.Ct. 260 | 4 |
| New Orleans R. Co. v. Jones (Miss.), 72 So. 681 | 3 |
| New York Central R. Co. v. White, 243 U.S. 188, 61 L.ed. 667, 37 S.Ct. 247 | 4 |
| N. Y. Cent. R. Co. v. Winfield, 244 U.S. 147, 61 L.ed. 1045, 37 S.Ct. 546 | 1, 2, 4 |
| Northern Pacific R. Co. v. Meese, 239 U.S. 614, 60 L.ed. 467, 36 S.Ct. 158 | 3 |
| South Buffalo R. Co. v. Ahern, 344 U.S. 367, 97 L.ed. 279 | 4 |
| Southern Pacific Company v. Romine, 251 Pac.(2d) 908 | 2 |

Pages

Wright v. New York Central R. Co., 33 N.Y.S. (2d) 53, New York affirmed 43 N.E.(2d) 97 without opinion, certiorari denied 317 U.S. 668, 63 S.Ct. 73, 87 L.ed. 537..... 5

OTHER AUTHORITIES

Federal Employers Liability Act, Title 45 U.S.C.A. Sec. 51, 53 Stat. 1404.....2, 3, 5, 6

Fifth Amendment of the Constitution of the United States.... 2

Fourteenth Amendment to the Constitution of the United States ..... 4

Rules of the Supreme Court, Paragraph 5(a), Rule 38..... 1

# In the Supreme Court of the United States

OCTOBER TERM, 1953

**No. 735**

C. C. ROMINE, as Administrator of the Estate of GEORGE A. ROMINE, Deceased,
*Petitioner,*

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
*Respondent.*

## Respondent's Brief Opposing Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

The petition for review by *certiorari* of a decision of the Supreme Court of Arizona is outside the scope of Paragraph 5(a), Rule 38, Rules of the Supreme Court. The federal question asserted to be involved, was determined in 1917 in *Erie R. Co. v. Winfield,* 244 U.S. 170, 61 L.ed. 1057, 37 S.Ct. 556, Ann. Cas. 1918B 662, 14 NCCA 957 (1917), and *N. Y. Cent. R. Co. v. Winfield,* 244 U.S. 147, 61 L.ed. 1045, 37 S.Ct. 546, which have been followed in a long line of cases down through the years. The Supreme Court of Arizona in

the opinion here sought to be reviewed, *Southern Pacific Company v. Romine,* 251 Pac.(2d) 908, held that upon the undisputed facts decedent was "unquestionably" engaged in duties closely affecting interstate commerce at the time of his death, and followed and quoted the *Winfield* case. The *Winfield* case held in substance that the entire field of employer responsibility for injuries, both negligent and non-negligent, to employees of interstate carriers had been occupied by The Federal Employers' Liability Act, and state legislatures had no right to interfere, even in instances where the Act did not provide for compensation.

Petitioner's argument in support of his reasons relied on for the allowance of the writ is divided into two parts. He asks this court to overrule *N. Y. Cent. R. Co. v. Winfield,* and he contends that the 1939 amendment to the Federal Employers' Liability Act, Title 45 USCA Sec. 51, 53 Stat. 1404, under his fact situation, does not apply.

On the first point, petitioner contends that the *Winfield* case deprives petitioner of a property right without due process of law, contrary to the Fifth Amendment to the Constitution of the United States. This contention is hard to follow, and petitioner concedes that he has been unable to find any law to support it.

The Federal Employers' Liability Act created a right in "any employee of a carrier" engaged in commerce or closely affecting commerce to recover damages for injuries or death suffered as the result of the negligence of the carrier. In case of the death of the employee, the right, by the express terms of the Act, accrues to the personal representative for the benefit of the widow, or children, or parents, or, if none, for the *dependent* next of kin. Petitioner does not fall into

any of these classes and hence complains that his property has been taken without due process. Actually no right ever existed in petitioner under the circumstances. See *Lindgren v. U. S.*, 281 U.S. 38, 74 L.ed. 686, 50 S.Ct. 207; *New Orleans R. Co. v. Jones* (Miss.), 72 So. 681; *Jones v. Charleston Ry.* (S.C.), 82 S.E. 415; *Illinois C. R. Co. v. Doherty's Adm.* (Ky.), 155 S.W. 1119, and *Melzner v. No. Pac. Ry. Co.* (Mont.), 127 Pac. 1002.

The *Lindgren* case points out that the Federal Employers' Liability Act gives a personal representative of a deceased employee the right to recover damages for such death *solely as trustee for the designated survivors* but does not give the personal representative any right of action on behalf of the estate. In that case, the decedent did not leave any dependents or other eligible next-of-kin, and this court, holding that the Act was intended to be both "paramount and exclusive," as respects state statutes on the subject, held that the administrator could not recover. In the *Lindgren* case, the contention was not made that the administrator had been deprived of property without due process. There the contention was that the Federal Act was not exclusive. Respondent's research confirms petitioner's statement that no case law supports his position.

This court has, however, consistently held that no deprivation of due process results under the Fourteenth Amendment from state statutes which limit the right of recovery for personal injuries. See:

*Martin v. Pittsburgh, L. E. R. Co.*, 203 U.S. 284, 51 L.ed. 185, 27 S.Ct. 100;

*Northern Pacific R. Co. v. Meese*, 239 U.S. 614, 60 L.ed. 467, 36 S.Ct. 158;

*New York Central R. Co. v. White*, 243 U.S. 188, 61 L.ed. 667, 37 S.Ct. 247;

*Mountain Timber Co. v. Washington*, 243 U.S. 219, 61 L.ed. 685, 37 S.Ct. 260.

The rationale of these cases is that no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit; and that the fact that Workmen's Compensation laws or similar laws require an injured person to look to the provisions of such law for relief and exclude a right of action which such person might theretofore have had at common law or under other statutes, does not contravene the due process clause of the Fourteenth Amendment.

Recently, and subsequent to the decision of the Supreme Court of Arizona here sought to be reviewed, this court has again considered the *Winfield* case and, in *South Buffalo R. Co. v. Ahern*, decided on January 19, 1953, 344 U.S. 367, 97 L.ed. 279, explicitly approved it, holding:

> "* * * the Federal Employers' Liability Act, supplanting a patchwork of state legislation with a nation-wide uniform system of liberal remedial rules, displaces any state law trenching on the province of the Act. State legislatures, for example, may not intrude into the Federal Act's interstate commerce perimeter to destroy uniformity by arbitrarily presuming the renunciation of rights which the Act confers, or by compelling parties to elect between their Federal remedies and an alternative State compensation plan. *Erie R. Co. v. Winfield*, 244 U.S. 170, 61 L.ed. 1057, 37 S.Ct. 556, Ann. Cas. 1918B 662, 14 NCCA 957 (1917)."

In three previous similar cases, this court has seen fit to deny *certiorari*. See *Copley v. Industrial Accident Commission*, 120 Pac.(2d) 879 (Cal.), *certiorari* denied, 316 U.S. 678, 62 S.Ct. 1108, 86 L.ed. 1752; *Allbright v. Penn. R. Co.*, 37 A.(2d) 870 (Md.), *certiorari* denied, 323 U.S. 735, 89 L.ed. 589, 69 S.Ct. 72; *Wright v. New York Central R. Co.*, 33 N.Y.S. (2d) 53, New York affirmed 43 N.E.(2d) 97 without opinion, *certiorari* denied 317 U.S. 668, 63 S.Ct. 73, 87 L.ed. 537.

If petitioner's contention were correct that he is not governed by the Federal Employers' Liability Act because his decedent was killed without negligence on the part of his employer, and that he can therefore proceed under the state law, then the absurd result would be that petitioner is in a more advantageous position than the widow or dependents of an employee in the same situation because the widow and dependents are specifically named in the Act and do not have that contention available to them. Petitioner contends that Congress intended to omit personal representatives by not naming them in the class entitled to recovery under the Federal Employers' Liability Act.

On the second point, petitioner's argument is also obscure. He quotes the 1939 amendment to the Federal Employers' Liability Act, which is as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way, directly or closely and substantially affect such commerce, as above set forth, shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act."

Without citation of authority in support, he says the last two clauses of this amendment are conjunctions and argues that the amendment means that the Act applies only when the employee is engaged in commerce and is entitled to the benefits of the Act.

We do not believe that counsel is serious in this contention, for it is obvious that the employee is within the Federal Employers' Liability Act if any part of his duties or the performance thereof in any way closely or substantially affects interstate commerce.

The use of the conjunction "and" does not create a contrast or a condition by the final clause of the above paragraph, but rather it concludes the paragraph by stating that the employees as designated by the body of the paragraph shall be considered as entitled to the benefits of this chapter.

It is noted that the amendment applies to "any employee," and it seems clear that the last clause of the amendment is simply additional and explanatory. This court in *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 72 S.Ct. 216, 96 L.ed. 205, held that the amendment:

> "* * * merely redefines for the purposes of the Federal Employers' Liability Act the scope of the word 'employee' to include certain persons not theretofore covered, because they were not directly engaged in interstate or foreign commerce."

It is evident that the 1939 amendment *enlarged* the class, instead of narrowing it as contended by petitioner.

## CONCLUSION

Respondent respectfully submits that the asserted Federal question here involved has been many times heretofore determined by this court and is fully settled; and since the Supreme Court of Arizona in the decision herein sought to be reviewed followed the settled line of decisions of this court, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

HAROLD C. WARNOCK
B. G. THOMPSON
WILLIAM A. SCANLAND
of KNAPP, BOYLE, BILBY & THOMPSON
907-916 Valley National Building
Tucson, Arizona

*Counsel for Respondent*

LAWRENCE L. HOWE
65 Market Street
San Francisco, California

*Of Counsel*

*Due service and receipt of a copy of the within is hereby admitted this.....day of May, 1953.*

.....

*Attorney for Petitioner*

28

Office - Supreme Court, U.S.
FILED
MAY 20 1953
HAROLD B. WILLEY, Clerk

# In the Supreme Court of the United States

OCTOBER TERM, 1952

**No. 735**

C. C. ROMINE, as Administrator of the Estate of GEORGE A. ROMINE, Deceased,
*Petitioner,*

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
*Respondents.*

## Petitioner's Reply Brief

GERALD JONES,
of CONNOR & JONES
303-7 Valley National Bldg.
Tucson, Arizona

FRED W. FICKETT
of FICKETT AND DUNIPACE
80 N. Church Street
Tucson, Arizona

HARRY L. BUCHANAN
109 N. Meyer Street
Tucson, Arizona
*Counsel for Petitioner.*

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

# In the Supreme Court of the United States

OCTOBER TERM, 1952

**No. 735**

C. C. ROMINE, as Administrator of the Estate of GEORGE A. ROMINE, Deceased,
*Petitioner,*

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
*Respondents.*

## Petitioner's Reply Brief

Our purpose in filing this reply brief is to prevent any misunderstanding by the members of the Court of our position under Reason I of our petition (page 10), and under Reason III (page 11).

Respondent's counsel appear to consider our argument under Reasons I and II to be confined to the contention that the Federal Employers Liability Act, as interpreted by the Arizona Supreme Court, violates petitioner's rights under the Fifth Amendment whereas in fact our contention under I is that the Federal Act should not be construed to prevent recovery by the petitioner under the Arizona Liability Law.

We had thought Reason I clear to that point but we find Respondent's counsel saying on page 2 "On the first point, petitioner contends that the *Winfield* case deprives petitioner of a property right without due process of law, contrary to the Fifth Amendment to the Constitution of the United States."

We stoutly contend that the Federal Act properly construed does not render nugatory the Arizona Employers' Liability Law where the employee sustains an interstate accident *unrelated to employer negligence* and that the decision of this Court in the *Winfield* cases should be reviewed and put aside. It is our belief that the dissenting opinion in the *Winfield* case by Justice Brandeis (whose elevation to the bench had but lately occurred and whose powers in this and other branches of jurisprudence were then but dimly realized) was sound and that the course of events since that decision confirms his views.

When *Winfield* was decided, the field of employer liability was generally thought to extend but little beyond the area of tort liability. Society was awakening to the duty of industry to care for those accidentally injured in its employ but the movement was in its infancy. Now the situation is reversed. The area of tort liability in the "field" is insignificant as compared to that of accident liability. Surely implications of one day from legislation do not chain the courts to a dead past.

We add a few additional words. Respondent's counsel argue on page 5 that if our contentions are accepted "the absurd result would be that petitioner is in a more advantageous position than the widow or dependents of an employee * * *". We cannot follow this argument. Under the

ruling of the Arizona Supreme Court the decedent's widow and children, had he left any, would have met precisely the same fate as did the petitioner.

The decision in the recent case of *South Buffalo Railroad Company v. Ahern* found in Volume 97 L.Ed. Advance Sheet 6, cited by respondent, does no more than hold that the carrier by appearing before the State Board estopped itself from claiming that the Federal Act prevented recovery under the State Act. Respectfully we submit that statements in the opinion as to the sweep of the Federal Act and its effect on state legislation were obiter. The state award was there upheld.

We hope that members of the Court will pardon us for calling to their attention the last paragraph of the dissenting opinion by Justice Douglas in *South Buffalo*, supra, in which he endorses views we are here presenting. We trust some other members of the Court will accept his invitation and join him so that the writ may be granted and the entire question reviewed in its present day setting.

We respectfully submit that such a review would mean a reversal of the court below and the announcement of a doctrine fair to those thousands now remediless because of the outmoded doctrine expressed by the majority in the *Winfield* case. If the court now adopts the principles of the dissenting opinion of Justice Brandeis, the benevolent aims of the Federal Act, which are referred to in the *South Buffalo* case, will be effectively carried out.

In the last sentence of Respondent's brief, we are quoted as contending that the 1939 amendment narrowed the class. Our true contention is that the 1939 amendment "has enormously enlarged the class of employees entitled to the bene-

fits of the Federal Employers Liability Act" (page 19 of Petitioner's brief), but that, even as enlarged, under the wording of the 1939 amendment, it has no application in cases, such as the one at bar, where no benefits are provided under the Federal Act.

Respectfully submitted,

GERALD JONES,
of CONNOR & JONES
303-7 Valley National Bldg.
Tucson, Arizona

FRED W. FICKETT
of FICKETT AND DUNIPACE
80 N. Church Street
Tucson, Arizona

HARRY L. BUCHANAN
109 N. Meyer Street
Tucson, Arizona

*Counsel for Petitioner.*